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11  
12 **UNITED STATES BANKRUPTCY COURT**  
13 **DISTRICT OF NEVADA**  
14

15 In re:

16 SANTIAGO SERRANO-LOPEZ

17 Debtors

Case No.: 10-26703-LBR

Chapter 13

**Hearing Date: 3/2/2011**

**Hearing Time: 11:00 AM**

18 **OPPOSITION TO MOTION FOR RELIEF AUTOMATIC STAY (DOC#38)**

19 The above captioned Debtor opposes the motion for relief from automatic stay (DOC#38) as  
20 filed by US BANK NA ("Creditor") relating to property commonly known as 1428 Helen Belle  
21 Drive, Las Vegas, Nevada 89110.  
22

23 In support of this opposition, the Debtors rely on the following memorandum of points and  
24 authorities, the pleadings and papers on the file herein, and the oral arguments of counsel which this  
25 court may consider at hearing on the motion.

Dated: March 1, 2011

**/s/ Steven L. Yarmy**

26 Steven L. Yarmy, Esq.  
27 Nevada Bar No. 8733  
28 sly@stevenyarmylaw.com  
*Proposed Attorney for the Debtor*  
*and Debtor-in-Possession*

**MEMORANDUM OF POINTS AND AUTHORITIES**

On September 1, 2010, the Debtor filed a case under Chapter 13 in the United States Bankruptcy Court for the District of Nevada.

The Property, which is not Debtor's residence, is necessary to an effective reorganization because the Debtor considers his interest in the property as part of his efforts to lease rental properties. These efforts are part of his reorganization. Therefore, relief should not be granted under Code § 362(d)(2).

Because Creditor has not offered any appraisal into evidence, there is no proof of equity, or lack of equity, in the Property. Therefore, relief should not be granted under Code § 362(d)(2).

Because Creditor has not offered any appraisal into evidence, there no proof of a decrease in value of the Property. Therefore, Creditor has not met its burden to prove that the Property is depreciating in value in order to insist, pursuant to Code section 362(d)(1), on adequate protection payments (*See In re Southern Illinois Railcar Co.*, 301 B.R. 305 (Bankr. S.D. Ill. 2002). (creditor presented no evidence that railcars were decreasing in value); and *In re Our Secret, Ltd.*, 282 B.R. 697 (Bankr. D. N.M. 2002) (no evidence of continuing depreciation of value of property presented that would justify an award of adequate protection). Accordingly, because Creditor has offered no proof of the Property depreciating in value, adequate protection payments are not required.

Additionally, Debtor is in the process of converting his Case to a Case under Chapter 11, which the hearing is set for March 9, 2011 at 2:00pm. The debtor was given bad advice and should have been in a Chapter 11 from the start.

An undersecured creditor is not entitled to Adequate Protection Payments let alone post-petition interest. It is the Creditors burden to show that the property is depreciating in value and continuing to depreciate. Absent proof this Motion should be denied. *In re Weinstein*, 227 B.R. 284 (B.A.P. 9th Cir., 1998).

1 In *Toibb v. Radloff*, 501 U.S. 157, 161, 111 S.Ct. 2197, 2199, 115 L.Ed.2d 145 (1991), the  
 2 Supreme Court expressly rejected the argument that individual debtors could not file a petition under  
 3 Chapter 11. The Court found nothing in the language of the Bankruptcy Code which precluded  
 4 individuals from reorganizing consumer debt under Chapter 11. *Id.* However, even prior to the *Toibb*  
 5 decision, we permitted modification of home mortgages in Chapter 11. See *Warner v. Universal*  
 6 *Guardian Corp.* (In re Warner), 30 B.R. 528 (9th Cir. BAP 1983).

8 The debtor intends to file Motions to Value once the case is converted to a Chapter 11. The  
 9 Debtor intends to file a Disclosure Statement and Plan within 60 days of the entry of the Order on  
 10 the Debtors Motion to Value.

11 With exceptions not pertinent here, § 506(d) states: "To the extent that a lien secures a claim  
 12 against the debtor that is not an allowed secured claim, such lien is void..." 11 U.S.C. § 506(d)  
 13 (emphasis added). Thus, § 506(d) operates to strip the undersecured creditor's lien from its  
 14 unsecured claim, in effect reducing the creditor's lien to the present value of the collateral. *Dever v.*  
 15 *I.R.S.* (In re Dever), 164 B.R. 132, 145 (Bankr.C.D.Cal.1994) ("lien-stripping under Section 506(d)  
 16 is available in Chapter 11"); accord *Jones*, 152 B.R. at 172-77.

### 18 **ADEQUATE PROTECTION**

19 Adequate protection is provided to safeguard the creditor against depreciation in the value of  
 20 its collateral during the reorganization process. 11 U.S.C. § 361(1). See *Paccomm Leasing Corp. v.*  
 21 *Deico Elecs., Inc.* (In re Deico Elecs., Inc.), 139 B.R. 945, 947 (9th Cir. BAP 1992). If the value of  
 22 the collateral decreases, the creditor is entitled to cash payments so that the value of its interest in the  
 23 collateral remains constant. 11 U.S.C. §§ 362(d)(1) and 361(1); see also *In re Addison Properties*  
 24 *Ltd. Partnership*, 185 B.R. 766 (Bankr.N.D.Ill.1995). Thus, the amount by which the collateral  
 25 depreciates is the amount of adequate protection to which the secured creditor is entitled. *Deico*  
 26 *Elecs.*, 139 B.R. at 947. As the Supreme Court explained in *Timbers*, adequate protection payments  
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 28

1 cannot be used to compensate the creditor for lost interest or to provide lost opportunity costs. 484  
2 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740.

3       The majority of courts have held that payments intended to provide adequate protection  
4 should be credited toward reducing the secured portion of the creditor's total claim where there is no  
5 depreciation in the value of the collateral. See Spacek, 112 B.R. at 165 (concluding that applying  
6 pre-confirmation payments towards the unsecured portion of the claim is an unauthorized transfer  
7 under 11 U.S.C. § 549); *In re B & B West 164th Street Corp.*, 147 B.R. 832, 840-41  
8 Bankr.E.D.N.Y.1992) (same); *In re Immenhausen Corp.*, 164 B.R. 347 (Bankr.M.D.Fla.1993); *In re*  
9 *Reddington/Sunarrow Ltd. Partnership*, 119 B.R. 809, 813 (Bankr.D.N.M.1990); *John Fabick*  
10 *Tractor Co. v. Maun* (*In re Maun*), 95 B.R. 94, 96 (Bankr.S.D.Ill.1989); *In re Canaveral Seafoods,*  
11 *Inc.*, 79 B.R. 57, 58-59 (Bankr.M.D.Fla.1987).

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13       Legal commentators considering the question have reached a similar conclusion. See 3  
14 COLLIER ON BANKRUPTCY § 361.032a (because adequate protection payments replace the lost  
15 value of collateral, "the better approach is to credit the payments against the secured claim rather  
16 than the unsecured claim"); David Gray Carlson, *Adequate Protection Payments And The Surrender*  
17 *of Cash Collateral In Chapter 11 Reorganization*, 15 CARDOZO L. REV. 1357, 1372 (1994)  
18 (adequate protection payments should reduce the secured claim and the total claim; the unsecured  
19 claim unaffected by adequate protection payments). We adopt the majority view and conclude that  
20 post-petition, pre-confirmation payments made on non-depreciating collateral must be allocated to  
21 reduce the secured portion of the creditor's claim.

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23  
24 *In re Weinstein*, 227 B.R. 284 (B.A.P. 9th Cir., 1998).

1           WHEREFORE, Debtors request that this Court deny the motion of Creditor for the foregoing  
2 reasons.

3  
4 **/s/ Steven L. Yarmy**  
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**CERTIFICATE OF SERVICE**

Pursuant to Fed.R.Bankr.P. 2002 and LR 2002, I certify that I am an employee of Citizens for Consumer's Rights and on June 8, 2010, I served a true and correct copy of the DEBTORS OPPOSITION AND TO MOTION FOR RELIEF OF STAY to the following via the courts CM/ECF system to:

GREGORY L. WILDE on behalf of Creditor US BANK NATIONAL ASSOCIATION  
[bk@wildelaw.com](mailto:bk@wildelaw.com)

and

US TRUSTEE

RICK A. YARNALL  
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/s/ Chris Craig  
Paralegal